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CITATIONS

518972—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 711

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 9–14) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 1, 1942 (R. 14). A motion for a new trial was overruled October 5, 1942 (R. 14–15). The petition for a writ of certiorari was filed February 5, 1943, an extension of time having been granted (R. 77). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939, as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. 288).

QUESTIONS PRESENTED

1. Whether under the Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. 288) this Court may review the record and hold that there is evidence to contradict the findings of fact made by the Court of Claims, or weigh the evidence and make findings of fact contrary to those made by that court.

2. Whether the action of the commissions selected to appraise lots in Creek townsites will be set aside and a revaluation made upon a showing of anything less than fraud or gross mistake.

3. Whether there is any evidence in the record showing a dereliction of duty on the part of the United States in valuing the town lots or establishing that they were appraised at other than their true value.

STATUTES INVOLVED

The pertinent part of Section 15 of the Curtis Act (Act of June 28, 1898, 30 Stat. 495, 500–501); Sections 10–15, inclusive, of the Act of March 1, 1901 (ratifying the original Creek Agreement), 31 Stat. 861, 864–866; and the Act of May 22, 1939, 53 Stat. 752 (28 U. S. C. 288) are set forth in the Appendix, *infra,* pp. 14–23.

STATEMENT

Under authority of the Act of May 24, 1924, 43 Stat. 139, as amended, the Creek Nation filed its amended petition in the Court of Claims on

December 27, 1937, seeking to recover, with interest, the value of certain town lots alleged to have been improperly appraised and sold by the United States (R. 1–4). The findings of the Court of Claims (R. 5–9) may be summarized as follows:

Prior to the passage of the Curtis Act of June 28, 1898, 30 Stat. 495, all land which had been ceded by the United States to the Creek Nation was held in communal ownership. While the individual Indian might have an exclusive right of occupancy to particular land, he could not dispose of the fee. Individual Indians conveyed the occupancy rights in land to white persons who came into Indian territory. These white persons made considerable improvements on the land and as a consequence a number of towns had grown up. (R. 5.)

The Curtis Act provided for the allotment of certain parts of the Creek domain to the individual members of the tribe and for the sale of the remainder. Included in the land to be sold were the lots in the aforementioned towns. The Act provided for commissions, whose duty it was to appraise and sell the lots and who were to be composed of one member representing the tribe, one member appointed by the Secretary of the Interior, and one member representing the town. Commissions were appointed for the towns of Muskogee and Wagoner and they proceeded to appraise the lots in these towns. (R. 6.)

Before the lots so appraised were sold, the United States and the Creek Nation entered into the original Creek Agreement, ratified by Congress and approved by the President March 1, 1901 (31 Stat. 861). This agreement provided for commissions similar to those of the Curtis Act, except that the members were to be appointed by the Secretary of the Interior. One of the members was required to be a citizen of the tribe and to be nominated by its Principal Chief. Their duty was to survey, plat, appraise and sell the town lots. Upon the passage of this Act, the Secretary of the Interior appointed the same commissioners for the towns of Muskogee and Wagoner as had been chosen for those towns under the Curtis Act. (R. 6.) Their appraisals, made under authority of the Curtis Act, and approved by the Indian Inspector, the Commissioner of Indian Affairs and the Secretary of the Interior, were adopted, resubmitted, and again approved by the Secretary (R. 7–8). He later appointed commissioners for the other towns within the Creek territory (R. 7).

The commissioners, who were qualified to discharge the duties for which they were appointed (R. 7), exercised their best judgment as to the value of each of the lots (R. 8). In every instance the appraisals were unanimous and were approved by the Indian Inspector, the Commissioner of Indian Affairs, and the Secretary of the

Interior. Prior to the making of the appraisals, no lots had ever been sold and no market values established. (R. 8.) After the appraisals were made, deeds to the lots in the seventeen towns here involved (R. 7) were executed by the Principal Chief of the Creek Nation, and at that time no one complained that the appraisals were too low. The Creek Nation did complain (in a tribal act of October 12, 1904, and a memorial of October 19, 1906) that lots had been wrongfully scheduled—permitting purchase by those not so entitled.[1] An Act was consequently passed (34 Stat. 137, 144) authorizing the filing of suits to remedy this situation, and 231 suits were filed thereunder based on wrongful scheduling. (R. 8.)

No proof is in the record, other than the appraisals, from which the true values of the lots as of the date of the appraisals can be determined, and the proof does not show that the lots were not appraised at their true values (R. 9).

Upon these findings of fact the Court of Claims concluded, as a matter of law, that the Creek Nation was not entitled to recover (R. 9). Accordingly, judgment was entered dismissing the petition (R. 14).

[1] Lot occupants who had made permanent improvements were entitled, under Section 15 of the Curtis Act and Section 11 of the Act of 1901 (Appendix, *infra*, pp. 15, 20–21), to purchase the lots they occupied. A schedule of such occupants was made to determine who could properly purchase (see R. 8).

ARGUMENT

1. The Act of May 22, 1939, c. 140, 53 Stat. 752 (28 U. S. C. 288), provides for a review of the evidence by this Court where error is assigned to the effect that there is a "lack of substantial evidence to sustain a finding of fact." But petitioner seeks to have this Court review the record[2] and hold that there is evidence to *contradict* the findings of fact made by the lower court. For instance, in specification of error No. 4 (Pet. 22–23), petitioner alleges that the court below erred in holding that the evidence "was not sufficient to show fraud and gross undervaluation in the appraisal and disposal of Creek town lots." See also specifications of error Nos. 10, 13, 15 and 16 (Pet. 24–25). Petitioner also seeks, in effect, to have this Court weigh the evidence and make findings of fact contrary to those made by the court below. For example, in specification of error No. 12 (Pet. 24–25), complaint is made of lack of consideration given to Mr. Foulke's report by the court below. See also specifications of error Nos. 8 and 9 (Pet. 23–24). This is not an assertion of "a failure to make any finding of fact on a material issue" (28 U. S. C. 288) but an attempt to secure a hearing *de novo* in the hope that this Court, on an independent weighing of the evidence, will find in petitioner's favor. When there

[2] The major part of the Government's evidence was, on motion of petitioner (Pet. 53–54), not printed for the purpose of petitioning for certiorari. It consists of some 230 typewritten pages.

is evidence which supports the findings (see pp. 9, 10, 12, *infra*), they will not be disturbed for lack of support, simply because there is other evidence which, if believed and accepted, would warrant contrary findings. *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 12; *Louis. & Nash. R. R.* v. *United States*, 238 U. S. 1, 11. Cf. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 477. And where a negative finding of fact involves the weighing of evidence, it is as conclusive on appeal as an affirmative finding. *Nashville Interurban Ry.* v. *Barnum*, 212 Fed. 634, 639–640.

2. The Court of Claims based its decision on the ground that the Secretary of the Interior was obligated to act in good faith in the appointment of the commissioners; that they in turn were obligated to act in good faith in appraising the lots; and that only a showing of fraud or gross mistake would justify setting aside their action and cause a revaluation of the townsites by that court (R. 11). Such a holding is clearly correct. *Ross* v. *Stewart*, 227 U. S. 530, 535; *Johnson* v. *Riddle*, 240 U. S. 467, 474. And this is especially true when consideration is given to the fact that the happenings complained of took place many years ago and that a revaluation at the present time, as of then, is practically impossible.[3] *United*

[3] Even William D. Foulke, whose report is the principal "evidence" relied upon by petitioner to show low valuation, admits this impossibility (R. 38).

States v. *Shrewsbury,* 90 U. S. 508. Nor does the fact that the United States is a party to this suit prevent the application of these principles, for it has been held many times in such a case that in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties. *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15; *United States* v. *Nix,* 189 U. S. 199, 205; *United States* v. *Page,* 137 U. S. 673, 679–680; *Confiscation Cases,* 20 Wall. 92, 108. There is no evidence in this record negativing the presumption of regularity and the lower court so held.

3. Petitioner defines the issue as being whether the United States has fulfilled its "agreement obligations" with the Creek Nation and whether in so doing it has measured up to exacting fiduciary standards (Pet. 28). It alleges a failure in this regard for four reasons: (1) the appointment of incompetent commissioners; (2) their "arbitrary" appraisals at less than "true value"; (3) the failure of the Secretary of the Interior to supervise the work of the commissioners; and (4) the approval of the appraisals with positive knowledge that they were extremely low and did not reflect the true value of the lots (Pet. 30). However, the Court of Claims has found to the contrary, and its findings are supported by abundant evidence. The record is replete with testimony that the commissioners were competent (Tr. 34, 35, 57, 77–78, 97, 208–209, 219, 225–226, 239–240,

252–254, 274–275),[4] and that they did not act in an arbitrary manner in making their unanimous appraisals (Tr. 43, 44, 48–50, 52–53, 58–60, 81–82, 162–163, 226, 239–240).

The commissioners in making the appraisals visited each lot, noted its location and desirability, considered the condition of the country surrounding the town, the proximity of the town to railroads, and such other facts as might bear on value (R. 61, 73–74). No way to evaluate the land better than the means actually used has been suggested. It must be remembered that the valuations were made not of lots that had a market value, since the fee could not be acquired until after passage of the Curtis Act (see Statement, *supra*, p. 3), but of lots as to the value of which differences of opinion would arise. "Where, for any reason, property has no market resort must be had to other data to ascertain its value; and, even in the ordinary case, assessment of market value involves the use of assumptions, which make it unlikely that the appraisal will reflect true value with nicety." *United States* v. *Miller*, No. 78, this Term decided January 4, 1943, pamphlet, p. 4. It is obvious (and the Court of Claims found) that the commissioners, who were competent, exercised their best judgment as to the value of each of the lots.

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[4] References are to the unprinted transcript which has been filed with the Clerk of this Court.

That the commissioners were properly supervised is apparent from the numerous letters of J. George Wright, Indian Inspector, to the Secretary of the Interior, appearing in the unprinted record (Tr. 32–36, 41–42, 48, 50, 51, 53–54; see also R. 68–69). These letters show an investigation of the conditions existing in the various towns which bear out the findings of the commissioners. The Secretary approved their appraisals, and there is nothing in the record to show that he acted arbitrarily or capriciously in so doing, or that he did not give the matter proper consideration.

Even if this Court were independently to weigh the evidence, petitioner has no competent proof in the record showing a dereliction of duty on the part of the United States in valuing the town lots in question or establishing that they were appraised at less than their true value.[5]

Petitioner, in contending that the lots were not appraised at their true values, places much reliance on statements contained in the report of William D. Foulke to the Secretary of the Interior. Foulke, as a consequence of the memorial of the Creek Nation of October 19, 1906 (R. 23; see Statement, *supra,* p. 5), apparently had been

[5] It is not seen how it could be established that the lots were valued at less than their true value unless petitioner first proved that "true value." The fact that the case was tried under Rule 39 (a) of the Court of Claims, limiting the hearing in the first instance to "the issues of fact and law relating to the right of the plaintiff to recover," does not excuse petitioner from this showing. Unless it be made, his right to recover cannot be determined.

authorized by the Secretary of the Interior to investigate frauds in the scheduling[6] of lots (R. 54), but he carried his investigations further and into the field of valuation (R. 25, 34). Whatever is said in his report on this latter subject cannot be considered as evidence since it was not within the scope of his authority. Even if it were, the report was not based upon the personal knowledge of Foulke nor was it made contemporaneously with the events mentioned therein, requisites for its admissibility. *United States* v. *Corwin,* 129 U. S. 381; *Brannen* v. *United States,* 20 Ct. Cls. 219. And it is evident from an examination of the report that it is biased and prejudiced and therefore not entitled to credence (see R. 23–24, 25, 26, 28, 29, 30, 31).

Petitioner points to evidence concerning appraisals for tax purposes by town authorities; reports of values of town lots made by the School Superintendent for Indian Territory; sales of lots at public auction; and sales of possessory rights to lots (Pet. 39–41). This evidence is clearly incompetent. As to the first three items there is no

[6] Petitioner makes no distinction between "scheduling" and "appraising." This suit is limited to damages resulting from alleged undervaluation. If erroneous methods of "scheduling," *i. e.*, determining who owned the lots, were employed by the commissioners, that is of no moment here. Most of petitioner's evidence relates to "scheduling" and has nothing to do with undervaluation. Certainly, if frauds were practiced on the commissioners in connection with scheduling, that can have no bearing on whether fraud was committed by the commissioners in valuing the lots.

showing that conditions were then the same as at the time of the commission's appraisals. The contrary is true. At the time of the appraisals no improvements had been made in any of the towns and they were in a very crude state. Thereafter, a real estate boom developed with an attendant increase in values (R. 13, 63). Consequently, a valuation as of that time would have little, if any, bearing on "true value" at the time the commissions made their appraisals. Prices paid for possessory rights to lots would also furnish no indication of their true value. The record shows that such prices fluctuated enormously because of the element of speculation and because of personal factors not connected with the actual value of the land (R. 63–64).

CONCLUSION

The decision of the court below is correct and presents no conflict of decisions or question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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